APPENDIX

Item 1 - Opinion and Order of District Court dated July 21, 1980 A2

Item 2 - Order of District Court dated October 17, 1980 A22

Item 3 - Opinion of Second Circuit dated January 20, 1982 A23

Item 4 - Opinion of Second Circuit dated July 2, 1980 (On Rehearing) A36

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U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Shop & Save Food Markets, Inc.	:	
	:	Civil Action
v.	:	
	:	File No. 78-44
Pneumo Corporation, Abbott Realty Company, Inc. and P & C Food Markets, Inc.	:	

OPINION AND ORDER

This is a civil action growing out of the parties' negotiations for and the final terms of a sublease of commercial property in Lyndonville, Vermont. Plaintiff has asserted claims under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and Vermont's Consumer Fraud Act. Defendants have filed a counterclaim alleging plaintiff procured said sublease from defendant Abbott Realty Company by fraud. Defendants have moved for judgment on the pleadings or for summary judgment on plaintiff's Sherman Act and Clayton Act claims, Fed. R. Civ. P. 12(c), 56(c), and have moved to dismiss plaintiff's state law claim for failure to state a claim on which we can grant relief, Fed. R. Civ. P. 12(b)(6). Plaintiff has moved to amend its complaint. Jurisdiction is grounded on 28 U.S.C. §§ 1332, 1337 and section 4 of the Clayton Act, 15 U.S.C. § 15.

Facts

Plaintiff is a Vermont corporation operating retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. Defendant Pneumo Dynamics Corporation (Pneumo) is a Delaware corporation that owns or controls the other defendants: P & C Food Markets, Inc. (P & C), a New York corporation operating a chain of retail grocery stores in Vermont and New England; Abbott Realty Company (Abbott), a Vermont corporation that manages property on behalf of Pneumo; and Cross Company, a wholesale grocery distributor acquired by Pneumo in 1972.

Prior to the events giving rise to this action, plaintiff was a month-to-month sublessee of the property where it operates its Lyndonville grocery store. The principal lessee was and is Abbott Realty, and plaintiff paid rent to Abbott on a monthly basis from 1970 to 1977. In 1972, Pneumo acquired the assets of Cross Company which included Abbott Realty; Pneumo transferred those assets to P & C in 1977. Prior to the events described below plaintiff purchased substantially all of its wholesale groceries from Cross.

In July of 1976 plaintiff sought from defendants a long term sublease to replace its existing monthly subtenancy under which plaintiff's rent amounted to $20,000 per year. This figure had remained constant since 1970. Plaintiff had determined at the same time to begin purchasing some of its wholesale goods from a competitor of Cross.

Defendant Pneumo responded to this request in December of 1976. Thereafter a protracted course of negotiations ensued, dictated in part by the parties' competing business considerations. Correspondence between plaintiff and Pneumo indicated that Pneumo's subsidiary P & C would be opening a retail grocery store in Lyndonville that would compete with plaintiff's store. In a letter dated December 13, 1976, Bernard Kane on behalf of Pneumo informed plaintiff that it would not offer a lengthy sublease to plaintiff at its current rent because that figure was not an accurate reflection of market value and because Pneumo feared the loss of plaintiff's wholesale purchases from Cross would diminish the total value of its relationship with plaintiff in Lyndonville.

On December 16, 1976, plaintiff wrote to Pneumo that it was unwilling to commit itself to any wholesale purchases from Cross, and Pneumo responded on January 12, 1977, with an offer of a long term sublease at $31,500 per year plus 1.5% of plaintiff's annual sales above $1,500,000.

This was unacceptable to plaintiff who proposed a sublease with rent that would vary according to the amount of wholesale purchases it made from Cross. Pneumo responded on January 24, 1977, with an offer embodying such a plan. Plaintiff found the amount of rent acceptable but remained displeased with the offered lease terms and renewal options. No final agreement was reached on the basis of the January 24 offer, although the parties may have operated under it for a

short period of time. Pneumo ultimately revoked the offer, reiterating its January 12 offer of straight rent at $31,500 per year plus 1.5% of gross sales in excess of $1,500,000. Plaintiff accepted this offer on May 5, 1977, and those remain the basic terms of the parties' contractual relations at this time.

1. Motion to Amend

We granted plaintiff's motion to amend its complaint at the time of hearing on June 2, 1980.

2. Plaintiff's Clayton Act Claim

As drafted, plaintiff's complaint asserted a claim under section 3 of the Clayton Act, 15 U.S.C. § 14. Plaintiff concedes that real estate transactions of the kind at issue in this case do not come within the ambit of section 3. Accordingly, its Clayton Act claim has been withdrawn.

3. Plaintiff's Sherman Act Section 1 Claims

Under section 1 of the Sherman Act, 15 U.S.C. § 1, plaintiff asserts that two forms of defendants' allegedly anticompetitive conduct are per se violations: an illegal tying arrangement and a group boycott or refusal to deal.

a. Illegal Tying Arrangement

An illegal tying arrangement was defined in Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958), as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any

other supplier." Id. at 5-6. See Hill v. A-T-O, Inc., 535 F.2d 1349, 1352-53 (2d Cir. 1976). The evil of tying arrangements that the Sherman Act seeks to eliminate is the shutting out of competition in the tied market and the extension of "pre-existing economic power to new markets for no good justification." American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972).

Defendants' position respecting plaintiff's claim of an illegal tie-in is that there is no agreement in existence that involves two products. Plaintiff has a lease for the Lyndonville retail premises where its store is located and is free to buy wholesale groceries from anyone. Defendants' position is compelling. The sine qua non of an illegal tying arrangement would seem to be the tying arrangement itself. One does not appear on the facts before us. However we might view the arrangements offered and rejected during negotiation of plaintiff's present lease, it remains that those offers never ripened into an agreement. The current agreement does not condition plaintiff's lease on the purchase of any unrelated wholesale groceries, and the offer which plaintiff accepted proposed no alternatives that might have imposed additional purchase conditions.

Plaintiff concedes that its able analysis of the subtleties of the law applicable to illegal tie-ins will not carry the day unless we can find a tie of two separate products. Plaintiff's Memorandum in Response

at 23 (filed December 1, 1978). Plaintiff's observation is correct because the focus of the Sherman Act with respect to tying arrangements is the maintenance of free competition in the market for a tied product. United States v. Loew's, Inc., 371 U.S. 38 (1962); Hill v. A-T-O, Inc. Thus two separate and distinct products must be linked by virtue of the vendor's economic power in the market for the tying product. Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1289 (2d Cir.), cert. denied, 419 U.S. 1022 (1974). "[T]he plaintiff must establish that he was the unwilling purchaser of the tied product." Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974). We do not reach the issues of economic power and coercion that plaintiff has briefed at length because we fail to discern two products that are linked in this case. As the parties' arrangement stands at this time, defendant exerts no influence over the allegedly tied market, i.e., wholesale groceries. If anything this arrangement has worked to defendants' competitive disadvantage as plaintiff has substantially reduced its wholesale purchases from defendants. Affidavit of James A. Bolanda (filed September 19, 1979, along with defendants' motion for judgment on the pleadings or summary judgment).

Plaintiff's principal argument misapprehends the nature of tying arrangements and the evil at which the Sherman Act aims in prohibiting them. Plaintiff seeks to characterize its present lease as one that embodies a "penalty" rent increase that is part of a completed tying arrangement. Its position is that

during the course of negotiation defendants offered an arrangement that, if accepted, would have tied plaintiff's rent to its wholesale purchases from defendants. Plaintiff refers to this as the "January 24 Restraint," but concedes that it never became effective. Plaintiff's Memorandum in Response at 39-40 (filed December 1, 1978). In all, plaintiff alleges the existence of three tying arrangements. The first allegation misrepresents the course of negotiations between the parties to include an offer of a lease on either of two conditions: the paying of "penalty" rent or the purchase of wholesale goods from defendants. On the record before us we can find no such offer. It appears that defendants made separate offers containing one or the other of these conditions alone, including a sliding scale rent based on plaintiff's purchases from defendants, but there is no evidence, nor is there an offer of any, that would support this first allegation. Plaintiff's contention that this arrangement amounted to a successful tie and is a continuing violation is plainly contradicted by the terms of the lease presently in effect: plaintiff has no option to reduce its rent by purchasing wholesale goods from defendants and plaintiff never selected from such a choice of options in entering into its present arrangement with defendants. The second and third alleged tying arrangements admit their own infirmity. They assert that offers that plaintiff rejected or that defendant withdrew amount to tying arrangements. Neither of these "arrangements" was ever effective as a matter of contract law for lack of acceptance. We

cannot find a tie-in on the basis of what might have been. We have reviewed the deposition testimony as well as the correspondence relevant to those negotiations, Affidavit of George K. McQuade, attachments (filed December 1, 1978), and have concluded that plaintiff accepted no offer from defendants during their negotiations that involved a possible tie-in arrangement. Had plaintiff selected its present arrangement from alternative offers that included the optional choice of a tying arrangement we possibly might have a different situation. Plaintiff had but one choice, however, when it made a conscious decision to pay the rent it presently pays.[1/] Any possibility of a tying arrangement was extinguished at that point regardless of what the parties earlier may have contemplated or what the motive of defendants may have been. It is clear that defendants have substantial economic power in their control of the Lyndonville premises, but on the facts alleged by plaintiff they did not use this power to the disadvantage of competition in the wholesale grocery market. We recognize that we should sparingly accord summary treatment to anti-trust claims, but we cannot ignore the essential elements of those claims. Plaintiff has failed to demonstrate or adequately allege the tying of two different products and we therefore grant defendants' motion for summary judgment on plaintiff's section 1 tying claim.

b. Illegal Boycott or Refusal to Deal

The second of plaintiff's claims under section 1 of the Sherman Act is that defendants conspired to coerce plaintiff not to do business with defendants'

competitor grocery wholesalers. In plaintiff's view, this conspiracy inflicted injury upon it in the form of increased rent as a consequence of plaintiff's refusal to join the conspiracy.

A concerted refusal to deal or group boycott, like an illegal tie-in, is a per se violation of section 1. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); International Railways v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 429 U.S. 835 (1976). While this much is clear, we are not convinced that defendants' conduct as described by plaintiff falls within the Sherman Act's prohibitions. Plaintiff does not claim it was injured by the alleged conspiracy nor that it or its business were the targets of such a conspiracy. Plaintiff's claim is that defendants acted in concert to coerce plaintiff to join in a boycott of third parties, wholesale competitors of defendants' company Cross. It was not the alleged conspiracy or combination among defendants that plaintiff claims caused its injury; plaintiff claims that it was penalized for refusing to join the defendants' conspiracy against others. The infirmity in plaintiff's claim is that while it asserts injury caused by the alleged conspirators, it does not and cannot assert injury resulting from the alleged conspiracy.

According to the authority plaintiff cites, "to state a claim upon which relief can be granted under . . . section [1], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961). To be sure, a conspiracy to refuse to deal would show a violation under section 1, but plaintiff cannot show that such a violation injured plaintiff; the most plaintiff can show is that it was injured by other acts of those involved in the alleged conspiracy. The target of the Sherman Act is the illegal combination, not the combiners. That plaintiff was injured by those involved in what it claims is illegal under section 1 does not by itself make out an anti-trust claim. Plaintiff's injury must somehow be caused by that illegality not merely by those guilty of it.

The cases plaintiff cites in support of its position are not to the contrary. In Radiant Burners, the plaintiff claimed that the American Gas Association conspired to deprive it of a market for its gas burners by refusing to grant plaintiff's product a seal of approval and simultaneously refusing to supply gas to unapproved burners.

In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the plaintiff was a retail dealer of appliances and electronic goods whose access to certain brands was either foreclosed completely or available only upon discriminatory terms as a result of the defendants' conspiracy. The Supreme Court reversed the lower courts and held that a plaintiff need not demonstrate a public wrong because Congress had determined group boycotts to be forbidden per se. Id. at 211. Nevertheless,

the Court did not go so far as to dispense with the requirement of a private wrong caused by the illegal combination of defendants, and such injury was clearly present in Klor's.

In Associated Press v. United States, 326 U.S. 1 (1945), the government brought suit against the Associated Press claiming that its system of by-laws and membership restrained trade in violation of the Sherman Act. No private plaintiff was awarded damages; the Court merely sustained relief in the form of an injunction against future violations. United States v. General Motors Corp., 384 U.S. 127 (1966), and American Medical Association v. United States, 317 U.S. 519 (1943), are to the same effect. If these cases may be read to exclude the necessity of proving the success of an attempted Sherman Act violation, it is nevertheless in the context of an action for injunction by the United States. The Clayton Act, 15 U.S.C. § 15, does not confer upon private parties a right to sue for damages that is coequal with the government's right to sue for an injunction. Section 15 plainly calls for an injury caused by reason of an antitrust violation before a private party may sue for damages. The undisputed facts of this case indicate that defendants' refusal to deal, if any, did not cause plaintiff's injury, if any. The antitrust laws do not give plaintiff a private right of action for all injuries it has suffered at the hands of those who happen to be involved in a Sherman Act violation. Its rights of action are limited to those injuries that are a material cause of or a substantial

factor in the occurrence of damage. Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793, 800-01 (2d Cir. 1977), cert. denied, 434 U.S. 923 (1977); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971). Plaintiff does not allege facts nor can we conceive of any that would support such a causal connection and its claim must therefore fail.

In addition, plaintiff's claim must fail because the only "conspiracy" it points to is P & C's determination to purchase wholesale groceries from Cross to the exclusion of other distributors. This "conspiracy" involved no other retailers--having failed to coerce plaintiff to join--and we note that the Sherman Act does not prohibit individual companies from dealing exclusively with other individual companies. "A publisher or manufacturer has the right unilaterally to choose the customers with whom he may deal." Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976)(citing United States v. Colgate & Co., 250 U.S. 300 (1919)). The necessary corollary of this proposition is that a retailer may without violating the Sherman Act select the wholesaler with whom it will do business exclusively. A single trader refusing to deal with another trader

does not constitute a group boycott. Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir.), cert. denied, 375 U.S. 922 (1963).

Again we are aware of our responsibility to exercise care in according summary treatment to antitrust claims. But as with plaintiff's first section 1 claim plaintiff has not alleged facts nor can we conceive of any that would make out a refusal to deal that would entitle it to treble damages under the Sherman Act. We grant defendants' motion for summary judgment on plaintiff's section 1 refusal to deal claim.

4. Plaintiff's Sherman Act Section 2 Claims

Plaintiff's amended complaint alleges that defendants conspired and attempted to monopolize the wholesale and retail gocery business in Lyndonville and St. Johnsbury, Vermont. Plaintiff claims defendants conduct violated section 2 of the Sherman Act. Although plaintiff makes, and the law recognizes, separate claims for an attempt to monopolize and a conspiracy to monopolize, there are common elements of the two claims that we can treat simultaneously.

Unlike actual monopolization, attempt and conspiracy to monopolize are activities that fall short of succeeding in the acquisition of monopoly power. For this reason, section 2 does not proscribe the acts standing alone that are in furtherance of a conspiracy or that constitute an attempt; those acts must combine with the specific intent to do what section 2 forbids, i.e., monopolize.

> Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a "specific intent"; an intent which goes beyond the mere intent to do the act.

United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945)(Hand, J.). See American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)("Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are . . . relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, 99 S. Ct. 103 ("specific intent to control prices or destroy competition with respect to a part of commerce (element 1) and predatory conduct directed to accomplishing the unlawful purpose (element 2)"); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976)("The offense of attempted monopolization requires both specific intent to accomplish the illegal result . . ., and a dangerous probability of success in that endeavor."). Justice Holmes's formulation in Swift and Co. v. United States, 196 U.S. 375 (1905), is as clear and accurate a statement as there is:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent--for instance, the monopoly-but require further

> acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

Id. at 396.

Since intent alone even if conclusively proved is not proscribed by section 2, we think it appropriate to begin our analysis of plaintiff's section 2 claims with the alleged acts of defendants, which must combine with such intent, before a violation of the Sherman Act occurs.

Much of the law that the federal courts have generated respecting acts that will support an attempt claim concerns the probability that the attempt would succeed if allowed to go forward. E.g., Janich Bros., Inc.; Sulmeyer. This is often termed "dangerous probability," id., and the parties herein so treat it. But before we reach the question of the dangerousness of any probability we must ascertain the existence of probability. If the means plaintiff asserts as the basis of defendants' attempt to monopolize could not possibly result in a monopoly, there can be no violation, and no need to explore the necessarily subjective realms of "dangerousness" and "intent."

The acts of defendants on which plaintiff bases its section 2 claim are set out in plaintiff's Memorandum in Response at 43 (filed December 1, 1978): (1) defendants' increasing involvement in the retail and wholesale grocery business; (2) the closing down of

a competitor (the Grand Union Store in St. Johnsbury); (3) the penalty rent extracted by defendants from plaintiff; and (4) defendants' ability to take over plaintiff's Lyndonville store location. Before considering these assertions we treat what must be the implicit allegation that the parties' lease negotiations, discussed in reference to plaintiff's section 1 claims, were part of defendants' attempt. The conduct of defendant in allegedly attempting to tie plaintiff's wholesale purchases to its lease was not an act which if successful would have achieved a monopoly for defendants. The most it would have achieved would have been the maintenance of defendants' wholesale market position existing at that time in Lyndonville.[3/] There is no assertion that indicates an attempt by defendants to improve that position in Lyndonville or in St. Johnsbury. Furthermore, plaintiff does not compete with defendants in the wholesale grocery business in either place; it cannot and does not point to an injury to its business or property that would permit it to sue under 15 U.S.C. § 15. Western Geophysical Co. v. Bolt Associates, 584 F.2d 1164, 1175 (2d Cir. 1978), and numerous cases cited therein.

As to plaintiff's allegations respecting the retail grocery market, none of them alone or together could possibly result in defendants' acquiring a monopoly position. The imprecise allegation of defendants' "increasing involvement" in the grocery business does not even begin to suggest conduct that could result in a monopoly. Moreover, "'increasing sales' and 'increasing

market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 612 n.1 (1977). The other "evidence" suggested by plaintiff's allegations are either not acts of defendants (closing down of competitor; ability to "take over" plaintiff's Lyndonville location) or immaterial to defendants' participation in the retail grocery market (raising plaintiff's rent).

We hold that none of the facts alleged by plaintiff suggest conduct by defendants that could result in its acquisition of monopoly power in the retail or wholesale grocery business in St. Johnsbury or Lyndonville. Regardless of defendants' intent--and we have serious doubts about the ability of the alleged facts to establish intent--the acts charged by plaintiff are not such that if successful would achieve that which the Sherman Act forbids. Furthermore, as we noted in our discussion of plaintiff's section 1 refusal to deal claim, defendants are not involved in a conspiracy respecting wholesale sales that is forbidden by the Sherman Act. The same reasoning applies to retail sales, and plaintiff has alleged no act that would support its bare assertion that defendants have conspired to take over the retail grocery business; neither do the facts underlying its antitrust claim in general support this claim. We are satisfied on the evidence presently available to us[3/] that a properly instructed jury, giving full weight to plaintiff's evidence, drawing every reasonable inference in its favor, and

subjecting defendants' evidence to a critical eye, could not rationally . . . [find] that plaintiff . . . [is] entitled to any relief." Ambook Enterprises v. Time, Inc., 612 F.2d 604, 611 (2d Cir. 1979)(footnotes omitted), cert. granted, 48 U.S.L.W. 3715. Nevertheless plaintiff strenuously argues that it requires further discovery in connection with its section 2 claim, particularly to determine the degree to which defendants' actions have so far succeeded and are likely to succeed in the future. Because this is an antitrust suit[4/] and because of the seemingly fervent nature of plaintiff's plea we believe plaintiff should be accorded the opportunity to come forward if possible with an offer of proof based on additional evidence to support its section 2 claim with regard to defendants' retail sales. For this purpose the parties may assume, but the court does not decide, that St. Johnsbury/Lyndonville is the relevant market area. Accordingly we reserve decision for ninety days on defendants' summary judgment motion to permit additional discovery with respect to plaintiff's section 2 claim of attempted monopolization of retail sales by the defendants. No later than the end of this period plaintiff shall appropriately indicate to the court the pertinent results of such additional discovery and the manner in which it claims it is relevant to its section 2 claim. Defendants are granted fourteen days thereafter in which to respond.

3. Motion to Dismiss the State Law Claim

Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss plaintiff's claim under Vermont's

Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §§ 2451-2462. We reserve decision on this motion pending our final disposition of defendants' motion respecting plaintiff's remaining federal claim under section 2 of the Sherman Act. GMW v. Gibbs, 383 U.S. 715, 726 & n.16 (1966).

Conclusion

We grant defendants' motion for summary judgment as to plaintiff's claims under section 1 of the Sherman Act, 15 U.S.C. § 1, and their motion as to plaintiff's section 2 claim respecting the wholesale grocery business; we reserve decision on defendants' motion for summary judgment as to plaintiff's claim respecting the retail grocery business under section 2 of the Sherman Act, 15 U.S.C. § 2, for a period of ninety days to permit the parties to proceed as above indicated; we reserve decision on plaintiff's state law claim pending decision on defendants' motion for summary judgment under section 2 of the Sherman Act. SO ORDERED.

Dated at Burlington in the District of Vermont, this 21st day of July, 1980.

Albert W. Coffrin
District Judge

Footnotes

1/ Plaintiff asserts that its decision was to choose the lesser of two evils, the far greater one being the obligation to "buy from and then compete directly with, a company with far greater resources, selling to itself, in the identical product." Plaintiff's Memorandum In Response at 33 (filed December 1, 1978). But such an argument ignores entirely the effect on the parties of competing economic and business considerations inherent in virtually all lease renewal negotiations. Any dilemma which plaintiff felt it faced must have resulted at least in part from such factors and the ultimate option available to plaintiff in its business judgment was no different than that of most negotiating prospective tenants: not to enter into the lease if the rent asked is too high or the terms too onerous. Indeed had this come to pass in the instant case plaintiff's claim of injury possibly would have been enhanced.

2/ At that time plaintiff was voluntarily purchasing substantially all of its groceries from defendants. Complaint at 2, ¶10 (filed February 22, 1978).

3/ We have made a thorough examination of the affidavits and exhibits submitted by the parties in support of and in opposition to summary judgment in favor of defendants and a review of the depositions on file.

4/ Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976)(Gurfein, J., concurring).

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United States District Court

FOR THE

DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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Shop & Save Food Markets, Inc.

vs.

Pneumo Corporation, Abbot Realty Company, Inc. and P & C Food Markets, Inc.

CIVIL ACTION FILE NO. 78-44

JUDGMENT

This action came on for ~~trial~~ hearing before the Court, Honorable Albert W. Coffrin, United States District Judge, presiding, and the issues having been duly ~~tried~~ heard and a decision having been duly rendered.

It is Ordered and Adjudged Defendants Motion for Summary Judgment is granted as to all claims asserted in plaintiff's complaint with the exception of the state law claim aserted under the Vermont Consumer Fraud Act, 9 V.S.A. Sec 2451, et seq.

Plaintiff's claim brought under the Vermont Consumer Fraud Act is dismissed without prujudice.

Defendants' Counterclaim is not extinguished pending appeal.

Dated at Burlington, in the District of Vermont, this 17th day of October, 19 80.

LEONARD W. LAFAYETTE
Clerk of Court

BY: Mary William Wallace
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—August Term, 1981

(Argued: October 9, 1981 Decided: January 20, 1982)

Docket No. 80-9053

SHOP & SAVE FOOD MARKETS, INC.,

Plaintiff-Appellant,

—against—

PNEUMO CORPORATION, ABBOTT REALTY COMPANY, and P & C FOOD MARKETS, INC.,

Defendants-Appellees.

Before:

FEINBERG, MESKILL, *Circuit Judges,*
and PALMIERI, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Vermont (Albert W. Coffrin, *J.*) granting summary judgment for the defendant in an action seeking damages under section 1 of the Sherman Act (15 U.S.C. § 1).

Affirmed in part and reversed and remanded in part.

* Hon. Edmund L. Palmieri, Senior United States District Judge for the Southern District of New York, sitting by designation.

JOHN L. PRIMMER, St. Johnsbury, Vt. (Downs Rachlin & Martin, St. Johnsbury, Vt., Robert D. Rachlin, Downs Rachlin & Martin, St. Johnsbury, Vt.), *for Plaintiff-Appellant*.

LESLIE W. JACOBS, Cleveland, Ohio (Thompson, Hine & Flory, Cleveland, Ohio, Charles L. Freed, Thompson, Hine & Flory, Cleveland, Ohio, Joseph E. Frank, Paul, Frank & Collins, Inc., Burlington, Vermont, Francis D. Price, Jr., P & C Food Markets, Inc., Syracuse, N.Y., of Counsel), *for Defendants-Appellees*.

PALMIERI, *District Judge:*

The plaintiff Shop & Save, a Vermont corporation, operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. The defendant Pneumo Dynamics Corporation (Pneumo), a Delaware corporation, owns or controls the other defendants: P & C Food Markets, Inc. (P & C), a New York corporation operating a chain of retail grocery stores in Vermont and elsewhere; Cross Company, a wholesale grocery distributor acquired by Pneumo in 1972; and Abbott Realty Company (Abbott), a Vermont Corporation that manages property on behalf of Pneumo, which was acquired with Cross in 1972.

Prior to the events giving rise to the instant controversy, plaintiff purchased substantially all of its groceries from Cross. It had also been a month-to-month sublessee of the property where it operates its Lyndonville grocery store from 1970 to 1977, paying a rental of $20,000 per year. The principal lessee was and is Abbott Realty, whose assets were transferred to P & C by Pneumo in 1977.

In July 1976 plaintiff sought from defendants a long-term sublease with renewal options. At the same time, it began to purchase a portion of its wholesale groceries from a competitor of Cross. Prolonged negotiations ensued until, ten

months later in May 1977, a long-term sublease was agreed to at $31,500 per year plus 1.5 per cent of plaintiff's annual sales above $1,500,000.

At the initial stages of negotiations, Pneumo informed plaintiff that it would not offer a lengthy sublease at the month-to-month rate because that figure did not reflect current market value and it feared that the loss of plaintiff's wholesale purchases from Cross would diminish the total value of its relationship with plaintiff in Lyndonville. It also became clear from the correspondence between the parties that Pneumo's subsidiary P & C would be opening a competing retail grocery store in Lyndonville.

When plaintiff indicated that it did not wish to commit itself to purchases from Cross, Pneumo responded with an offer of a long-term sublease at the terms finally agreed to in May 1977. Prior to this final agreement, however, several offers and counteroffers were considered and may have been operated under for a short period of time. Among these was an offer by Pneumo that rent vary from $20,000 to $31,500 per year according to the amount of groceries purchased from Cross. Plaintiff found the rent formula acceptable ("we have no alternative but to accept") but was not satisfied with the lease terms and renewal options offered by Pneumo. Subsequently, Pneumo revoked its variable rent offer, and reiterated its flat rent offer upon which terms the parties finally agreed.

ISSUES PRESENTED

Appellant claims that the district court erred in granting summary judgment for defendants on the two section 1 Sherman Act violations it alleged: 1) a group boycott or concerted refusal to deal; and 2) a tying arrangement.[1]

Summary judgment is useful as a "procedural weapon to

[1] Although the plaintiff asserted other federal claims as well as claims under Vermont statutes, the parties agree that the present posture of the case makes it unnecessary to examine them.

pierce sham claims and resolve actions where the facts are undisputed." *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967); *aff'g district court on remand*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). It is often, however, "too blunt a weapon with which to win the day, particularly where . . . complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case." *Miller v. General Outdoor Advertising Co.*, 337 F.2d 944, 948 (2d Cir. 1964). This is particularly true in the case of antitrust litigation, *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), although in the proper case summary judgment may be granted, *see Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 667 (2d Cir. 1974); *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1292-93 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). Whether or not a material fact is in dispute, so as to preclude summary judgment, is a "matter of informed and properly reasoned judgment" as the law provides "no magical talisman or compass [to] serve as an unerring guide" in this determination. *American Manufacturers Mutual Insurance Co., supra* at 279. If a material issue of fact does exist, the court may not grant summary judgment unless, assuming all facts alleged by plaintiff, and the reasonable inferences to be drawn thereupon, to be true, it finds that the law does not recognize plaintiff's claim for relief.

We are satisfied that Judge Coffrin's thorough opinion properly applied the above standards to the claims before him on the issue of a group boycott or concerted refusal to deal. We must reverse and remand, however, on the issue of whether an illegal "tying arrangement" existed since we believe the grant of summary judgment by the lower court was premised on a too limited view of the types of acts which may satisfy the "tying" element of this section 1 violation.

DISCUSSION

The Supreme Court has defined an illegal tying arrangement as "an agreement by a party to sell one product but

only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958). A tying arrangement will be *per se* illegal, and thus prohibited without proof of *unreasonable* anti-competitive effect, if in addition to a "tie" of two distinct products it is demonstrated that: defendants possess sufficient economic power in the tying market to coerce the purchase of the tied product; actual coercion to purchase the tied product was employed; anticompetitive effects result in the tied market; and a noninsubstantial amount of interstate commerce is involved in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pacific Railway Co., supra; Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980); *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1352-55 (2d Cir. 1976); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 661-63 (2d Cir. 1974); *Coniglio, supra*, at 1289.

As stated in *Northern Pacific Railway Co., supra*, at 6:

> "Where [tying] conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." (footnote omitted)

The inherently pernicious effects of tying arrangements are thus deemed to require "*per se* illegal" treatment.

Judge Coffrin found it unnecessary to analyze each element

of a successful tying claim because he thought there was a failure of any allegations of the most basic element—a "tie":

> "We do not reach the issues of economic power and coercion that plaintiff has briefed at length because we fail to discern two products that are linked in this case. As the parties' arrangement stands at this time, defendant exerts no influence over the allegedly tied market, *i.e.* wholesale groceries. . . .
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> ". . . . We cannot find a tie-in on the basis of what might have been. . . . Any possibility of a tying arrangement was extinguished [when a non-tying agreement was reached] regardless of what the parties earlier may have contemplated or what the motive of defendants may have been." *Opinion and Order of the District Court*, July 22, 1980, at 5-6.

Judge Coffrin thereupon granted summary judgment for defendants finding the absence of a successful tie, despite plaintiff's allegations that it was coerced into accepting a "penalty rent" in lieu of a "leasehold-grocery" package.

We find that plaintiff's allegations of fact, and the inferences to be drawn therefrom, would satisfy the requirement of a tie if a substantial "penalty" were indeed forced upon plaintiff in a manner prohibited by section 1 of the Sherman Act. While a prototypical tie is demonstrated by the embodiment of two distinct products in a final agreement, we find that an unsuccessful tie which results in a price penalty for the single item agreed upon satisfies the tying requirement as well.

A price penalty, if high enough, has as much anticompetitive effect as a traditional tie-in. This case potentially demonstrates how a penalty rent could be used to achieve the effects of a tie-in. If we assume that the penalty rent is high,[2] then Shop & Save will be forced to pass the increment

[2] Whether the rent charged is in fact a penalty—that is, whether it is significantly higher than the fair market value of the property—is an issue to be determined by the district court on remand, as we indicate below.

on to its customers. The higher prices encountered at Shop & Save's Lyndonville store will influence customers to do their shopping elsewhere, perhaps at the store run by defendant's subsidiary, P & C. If we were to further assume that mainly Cross products were sold in P & C stores, then this would, in turn, give the Cross products a competitive edge that is due not to their intrinsic worth, but to the economic clout exerted by Pneumo, as lessor of appellant's grocery store. This arrangement would then have the deleterious effect described by the Supreme Court in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958): "[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." The ability of certain competitors to disguise tie-ins should not be allowed to thwart the important policies embodied in the Sherman Act. *Cf. Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976) (giving free memberships in buying clubs only to vacuum cleaner purchasers may violate the anti-tying statute); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961) (cancellation of lease violative of tie-in statute upon proof that lease was cancelled for lessee's refusal to purchase products from lessor).

Nothing in the Supreme Court's decisions militates against[1]

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[1] Though the Court has stated the definition of a tying arrangement as an agreement to tie two distinct products together, *see Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958), we find nothing in the language employed by the Court to suggest that this definition is exclusive. Rather, the Court's enunciations have gone no further than to decide the cases before it, which have all, to date, included allegations of a tying agreement. *See, e.g., id.* at 5 ("For our purposes a tying arrangement may be defined. . . .").

The possibility that the issue before us might arise can be perceived in the Court's decision in *Northern Pacific Railway Co., id.* at 6 n.4 (emphasis added):

> "Of course, where the buyer is *free to take either product by itself* there is no tying problem even though the seller may also offer the two items as a unit at a single price."

It should also be noted that many of the lower court cases, relied upon by

or compels[4] a finding that a disguised tie-in can violate the Sherman Act. Yet the logical conclusion to draw, based on the policy prohibiting tying arrangements, is that the pernicious effects of a tie sought to be eradicated is the anticompetitive coercion of a party to take that which he does not seek because of the market power exerted by another by virtue of the latter's control over the tying product's market.

Where, on a motion for summary judgment, sufficient facts are alleged to permit reasonable inferences that a tying arrangement was sought to be "forced" upon a plaintiff and, although not finally agreed to, the resulting price for the single tying product reflected a significant penalty extracted to avoid purchase of the tied product, the plaintiff has stated a sufficient case on this issue to have it presented for trial. Since we find that the record before the trial judge permitted such inferences, thus presenting a genuine issue of fact which precludes summary judgment, we reverse and remand for proceedings consistent with this opinion.

We suggest, however, that in the interest of judicial econ-

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appellee for the proposition that two products are required for a § 1 violation to occur, do not deal with that point as a dispositive issue. For example, the issue in *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), was whether the appellant had been coerced to buy a product he did not want. We do not dispense with the requirement of coercion; rather, we remand to the district court for determination of whether Shop & Save was coerced to pay this increased rent. Similarly, *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), was decided on the narrow issue of whether the seller of the tying products had "sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product." *Id.* at 57, 58-59.

[4] The remedial decree in *United States v. Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962), does not compel our decision. In *Loew's*, the court found a tying agreement and its remedial decree, as strengthened by the Supreme Court, forebade *any* price differential between the products offered individually and as part of a package, unless cost justified. *Id.*, 189 F. Supp. at 399, 371 U.S. at 54-55. This court has previously warned against relying on the remedial decree in *Loew's* as a basis for determining the elements necessary for proof of an illegal tie. *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1136-37 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). We reaffirm that decision today and the reasoning set forth therein.

omy the district court first consider for trial any or all of the three prongs to the test enunciated herein: 1) whether the defendants were seeking to tie the leasehold with a purchase of wholesale groceries; 2) whether the agreed upon rent embodied a significant penalty; and 3) whether such penalty was the result of anticompetitive coercion exerted by defendants.[5] The determination of these issues is left to the trier of fact's reasoned judgment. We set forth the following guidelines, however, for consideration of these issues.

The first decision—whether defendants sought a tying arrangement—should be based upon an assessment of the negotiation proposals actually made, including the inferences to be drawn from the course of negotiations, which would establish whether the defendants did seek plaintiff's agreement to a "package deal."

The second decision—whether a significant penalty resulted—should rest upon such considerations as the fair market value of the leasehold and the special additional value when obtained by a month-to-month lessee already in possession, *e.g.*, avoidance of moving expenses, the cost of business suspension, and the expenses of installation at a new site. We recognize that the determination of whether, and to what extent, a penalty rent was exacted cannot be made with mathematical certainty in the immediate case. In light of the policy embraced in the Sherman Act, as well as the treble damages authorized by it, we find that a section 1 tying violation will exist only if a significant penalty price for the tying item alone has been exacted. *Cf. SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1110-14 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056, (3d Cir.), *cert. denied*, 439 U.S. 838 (1978) (no illegal tie was found to

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[5] The cases cited by the parties from other circuits are not inconsistent with the rule herein enunciated. *United States v. Westinghouse Electric Corp.*, 471 F. Supp. 532, 544-45 (N.D. Cal. 1978); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1110-14 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056, 1061-62 n.3 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

exist where a 3% "bonus rebate" on the tying product was conditioned on the purchase of the tied product, since the plaintiff was "free to take either product by itself").

The final decision—whether such a penalty was the result of anticompetitive coercion—should be resolved on the basis of this circuit's precedents on the issue. *See, e.g., Hill, supra* at 1355; *Capital Temporaries, Inc., supra* at 661-63; *American Manufacturers Mutual Insurance Co., supra* at 1136-37.*

If, after trial, it were found that any of the above elements were not proven by plaintiffs, no violation of section 1 of the Sherman Act would have occurred.†

We therefore reverse and remand the district court's grant of summary judgment on the tying claim, and affirm in all other respects the decision below.

MESKILL, *Circuit Judge (Concurring in part and dissenting in part):*

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of

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* As stated by this court:

"Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend pre-existing economic power to new markets for no good justification. . . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. To adopt [the position that any package offer is illegal] would subject businesses to threats of antitrust sanctions whenever they tried by bravado to buttress a sagging market position by initially offering small quantities of desired goods at high prices, in hopes of eliciting a large order without further negotiation. Such bartering ploys are not generally the concern of antitrust laws."

American Manufacturers Mutual Insurance Co., supra at 1137.

† A similar suggestion was made by this court in *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967), and followed by the district court on remand. The result was a proper dismissal of the case after only a three day trial. *See id.*, 446 F.2d 1131, 1133 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). If, in his assessment of the posture of the case, Judge Coffrin finds it prudent to submit separately for trial any or all of the issues enunciated herein, we believe that a proper resolution of this case may be more expeditiously reached.

trade. . . ." 15 U.S.C. § 1 (1976). However, since *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), it has been recognized that only unreasonable restraints of trade are prohibited. In evaluating conduct under section 1, the Supreme Court "has held that certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8 (1979) (citations omitted). One of the types of conduct which have been held to be illegal *per se* is the tying arrangement. *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

"[T]he vice of tying agreements lies in the use of economic power in [the tying] market to restrict competition on the merits in [the tied market]." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11 (1958); *see Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953). Therefore, as the Supreme Court and this Circuit have held, to prove a tying violation a plaintiff must establish, *inter alia*, the existence of two separate and distinct products, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6; *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286, 1289 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974), that he was actually coerced by the seller into agreeing to buy the tied product, *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 662-63 (2d Cir. 1974); *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976), or at least into agreeing not to purchase the tied product from another, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6, and that the illegal tying arrangement resulted in the actual foreclosure of competition in the tied product market, *id.* at 6; *International Salt Co.* v. *United States*, 332 U.S. at 396; *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d at 1292. An attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not, by itself, a tying violation.

Plaintiff has not agreed to buy the tied product from defendant or to refrain from purchasing the tied product from another.

The majority asserts, nevertheless, that the exaction of a penalty price for the tying product has as much anticompetitive effect in the tied market as a traditional tie-in and, therefore, should be treated as the functional equivalent of a tying arrangement. The sole support for this proposition is the claim that, in the present case, it is conceivable that because Shop & Save had to pay a higher price for the tying product, it will be forced to raise its retail grocery prices which will in turn lead to an increase in P & C's retail market share and to an increase in Cross' share of the wholesale grocery market.

I do not believe that *per se* rules should be expanded merely because one hypothetical situation can be perceived in which an anticompetitive effect could possibly result. The Supreme Court has stated that in deciding whether to classify conduct as *per se* illegal,

> our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive".

Broadcast Music, Inc. v. *CBS*, 441 U.S. at 19-20. The majority has not indicated, nor can I discern, a connection between the tying and the tied markets from which to conclude that the exaction of a penalty price for the tying product "always or almost always tend[s] to restrict competition and decrease output" in the tied market.

The lack of a definite nexus between the tying and the tied markets can be illustrated by the present case. For example, rather than raise its retail prices and risk a loss in market

share, Shop & Save may cut its other costs of operation or may find a new supplier who offers wholesale groceries at lower prices. Furthermore, Shop & Save may absorb the increased cost of the tying product by maintaining prices and cutting its profit margin. Even if Shop & Save is forced to raise its prices it will not necessarily lose customers. Shop & Save may be able to maintain its customer base through non-price competition. Finally, any loss in Shop & Save's market share will not necessarily result in the restriction of competition in the wholesale grocery market. Other retail stores who do not purchase wholesale from Cross may acquire Shop & Save's lost market share.

Thus, as is evident, the anticompetitive effect perceived by the majority is too attenuated and too speculative properly to serve as a basis for expanding the definition of "tying arrangement." Therefore, I would confine the tying label to cases where the buyer was the "unwilling purchaser of the tied product[.]" *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d at 663, or where he actually agreed not to purchase the tied product from the seller's competitors, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6.

In deciding whether to invoke the *per se* rule, we must be cognizant of the teachings of the Supreme Court that "easy labels do not always supply ready answers[.]" *Broadcast Music, Inc.* v. *CBS*, 441 U.S. at 8, and that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act[.]" *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Accordingly, as we recently noted, the expansion of *per se* rules should be approached with great caution. *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, slip op. 169, 179 (2d Cir. Nov. 2, 1981). The alleged unlawful conduct may well give rise to a cause of action. However, it does not constitute an unlawful tying arrangement, a group boycott or a concerted refusal to deal. Therefore, I disagree with that portion of Judge Palmieri's opinion that holds otherwise. I would affirm Judge Coffrin's decision in its entirety.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—August Term, 1981

(Argued October 9, 1981 Decided January 20, 1982)

(On Rehearing Decided July 2, 1982)

Docket No. 80-9053

SHOP & SAVE FOOD MARKETS, INC.,

Plaintiff-Appellant,

—v.—

PNEUMO CORPORATION, ABBOTT REALTY COMPANY, and P & C FOOD MARKETS, INC.,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*, MESKILL, *Circuit Judge*, and PALMIERI, *District Judge.**

* Hon. Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

On rehearing of an appeal from a judgment of the United States District Court for the District of Vermont, Albert W. Coffrin, *Judge*, granting summary judgment for defendants in an action asserting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

Affirmed. Chief Judge Feinberg concurs in a separate opinion.

(JOHN L. PRIMMER, St. Johnsbury, Vermont, Robert D. Rachlin, Downs Rachlin & Martin, St. Johnsbury, Vermont, of counsel), *for Plaintiff-Appellant.*

(LESLIE W. JACOBS, Cleveland, Ohio, Charles L. Freed, Thompson, Hine & Flory, Cleveland, Ohio, Joseph E. Frank, Paul, Frank & Collins, Inc., Burlington, Vermont, Francis D. Price, Jr., P & C Food Markets, Inc., Syracuse, New York, of counsel), *for Defendants-Appellees.*

(WILLIAM F. BAXTER, Assistant Attorney General, Robert B. Nicholson, George Edelstein, Department of Justice, Washington, D.C., of counsel), *for Amicus Curiae United States.*

MESKILL, *Circuit Judge*:

Rehearing has been granted. The opinion filed on January 20, 1982, slip op. 883, is withdrawn and the following is substituted therefor.

Shop & Save Food Markets, Inc. (Shop & Save) appeals from a judgment of the United States District Court for the District of Vermont, Albert W. Coffrin, *Judge*, granting summary judgment for defendants Pneumo Corporation (Pneumo), Abbott Realty Company (Abbott) and P&C Food Markets, Inc. (P&C), in an action asserting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[1] For the reasons set forth below, we affirm the judgment of the district court.

I

Shop & Save, a Vermont corporation, operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. Pneumo, a Delaware corporation, owns or controls the other defendants: P&C, a New York corporation which operates a chain of retail grocery stores in New England; and Abbott, a Vermont corporation, which manages property for Pneumo. Pneumo acquired Abbott and Cross Company (Cross), a wholesale grocery distributor, in 1972.

Prior to the events giving rise to this action, Shop & Save purchased virtually all of its groceries from Cross. From 1970 to 1977 Shop & Save subleased from Abbott the property where it operates its Lyndonville grocery store, paying a rental of $20,000 per year. Abbott's assets were transferred to P&C in 1977.

In July 1976, Shop & Save sought from Pneumo a long-term sublease with renewal options for the Lyndon-

[1] Although Shop & Save also asserted claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and a claim under the Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9 §§ 2451 *et seq.*, Shop & Save does not appeal from the grant of summary judgment for the defendants on these federal claims and the dismissal of the state claim.

ville property. Thereafter, a protracted course of negotiations ensued, dictated in part by the parties' competing business considerations. During this time, Shop & Save began to purchase a portion of its wholesale groceries from a competitor of Cross. Further, correspondence between the parties indicated that P&C would be opening a competing grocery store in Lyndonville.

Initially, Pneumo responded to Shop & Save's request by offering to provide a long-term lease if Shop & Save agreed to continue to buy groceries from Cross. When Shop & Save refused to commit itself to purchases from Cross, Pneumo responded that it would not offer a lengthy sublease at the month-to-month rate because that figure was "far below" current "fair rental values." Pneumo stated that if it had to risk the loss of Shop & Save's wholesale purchases from Cross, it wanted "compensation." Pneumo repeated its offer to provide a long-term lease if Shop & Save agreed to continue its purchases from Cross.

On December 16, 1976, Shop & Save reiterated to Pneumo that it was unwilling to commit itself to any wholesale purchases from Cross. Pneumo responded on January 12, 1977, with an offer of a long-term sublease at $31,500 per year plus 1.5 percent of Shop & Save's annual sales above $1,500,000. Thereafter, several offers and counteroffers were considered by the parties. Among these was an offer by Pneumo on January 24, 1977 that rent vary from $20,000 to $31,500 per year depending upon the amount of groceries purchased from Cross.[2]

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[2] Shop & Save alleged in its complaint that it had accepted Pneumo's January 24 offer but that in April 1977, before a sublease embodying these terms was signed, Pneumo revoked the offer. Shop & Save claimed that in the interim, it had purchased groceries from Cross with the understanding that the January 24 agreement was in effect. However, Shop & Save alleges no injury from this conduct. Accord-

Shop & Save found the rental formula acceptable but was not satisfied with the lease term and renewal options. Accordingly, no final agreement was reached on the basis of the January 24 offer. Pneumo ultimately revoked its variable rent offer, and reiterated its flat rent offer, which Shop & Save accepted on May 5, 1977.

On February 21, 1978, Shop & Save filed a complaint charging, *inter alia*,[3] that defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants moved for summary judgment on September 19, 1978. In opposing this motion, Shop & Save argued that it was forced to pay defendants a "penalty" rent for the Lyndonville property because it refused to purchase its wholesale groceries from Cross, and that defendants' conduct constituted a tying arrangement and a group boycott or concerted refusal to deal, all of which are *per se* unlawful.

The district court, on July 21, 1980, granted summary judgment for the defendants on Shop & Save's Section 1 Sherman Act claims. Judge Coffrin found that defendants' alleged conduct did not constitute a group boycott or a concerted refusal to deal because the only relevant conduct which Shop & Save "point[ed] to [was] P & C's determination to purchase wholesale groceries from Cross to the exclusion of other distributors. This [conduct] involved no other retailers—having failed to coerce [Shop & Save] to join—and we note that the Sherman Act does not prohibit individual companies from dealing exclusively with other individual companies." J. App. at 223. The district court found in the alternative that even if defendants had conspired to coerce Shop & Save to agree

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ingly, we need not decide whether an unlawful tying arrangement existed during this period.

3 *See* note 1, *supra*.

not to purchase wholesale groceries from Cross' competitors, Shop & Save had failed to allege an injury that was causally related to a group boycott or concerted refusal to deal. The district court also found that the alleged conduct did not constitute an illegal tying arrangement because there was no agreement in existence that involved two products. Shop & Save had acquired a lease for the Lyndonville premises and was free to purchase its wholesale groceries from any supplier.

II

The narrow issues presented on appeal are whether the district court erred in holding that defendants' alleged conduct did not constitute a *per se* illegal group boycott or concerted refusal to deal, or a *per se* illegal tying arrangement. For the reasons set forth in Judge Coffrin's thorough opinion, J. App. at 212-231, we affirm the grant of summary judgment on Shop & Save's group boycott or concerted refusal to deal claim. We also agree with the district court that defendants' alleged conduct does not constitute an illegal tying arrangement.

"[T]he vice of tying agreements lies in the use of economic power in [the tying] market to restrict competition on the merits in [the tied market]." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11 (1958); *see Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953). Therefore, as the Supreme Court and this Circuit have held, to prove a tying violation a plaintiff must establish, *inter alia*, the existence of two separate and distinct products, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6; *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286, 1289 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974), that he was actually

coerced by the seller into agreeing to buy the tied product, *Unijax, Inc.* v. *Champion International, Inc.*, slip op. 3413 at 3426-27 (2d Cir. June 21, 1982); *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 662-63 (2d Cir. 1974); *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976), or at least into agreeing not to purchase the tied product from another, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6, and that the illegal tying arrangement resulted in the actual foreclosure of competition in the tied product market, *id.* at 6; *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d at 1292.

In this case, Shop & Save admits that no agreement was reached on Pneumo's January 24 offer which provided for a variable rent depending upon the level of Shop & Save's wholesale grocery purchases from Cross.[4] Shop & Save asserts, however, that it has been forced to pay a penalty rent for the Lyndonville property. Shop & Save alleges that Pneumo's exaction of this penalty rent constitutes an illegal tying arrangement. We disagree.

As stated above, a tying arrangement cannot exist unless the buyer was actually coerced by the seller into agreeing to buy the tied product or to refrain from purchasing the tied product from the seller's competitors. *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. at 5-6; *Unijax, Inc.* v. *Champion International, Inc.*, slip op. 3426-27; *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d at 662-63; *Hill* v. *A-T-O, Inc.*, 535 F.2d at 1355. Absent this showing, there is lacking a definite nexus between the tying and the tied markets from which to

[4] We express no opinion on whether an unlawful tying arrangement would have existed had an agreement been reached on the January 24 offer.

conclude that the seller's exercise of economic power in the tying market will "always or almost always tend to restrict competition and decrease output," *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979), in the tied market. For example, in the present case, even if Shop & Save has to pay a "penalty" for the tying product, Shop & Save is free to purchase and in fact admits that it does purchase its wholesale groceries from competitors of Cross. Accordingly, because the seller is unable to use his power or leverage in the tying market to deny his competitors free access to the tied market, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 6, an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation.[5]

In deciding whether to invoke the *per se* rule, we must be cognizant of the teachings of the Supreme Court that "easy labels do not always supply ready answers[,]" *Broadcast Music, Inc.* v. *CBS*, 441 U.S. at 8, and that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act[,]" *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). The alleged unlawful conduct in this case may well give rise to a cause

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5 As stated by this Court:

> Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend preexisting economic power to new markets for no good justification . . . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie.

American Mfrs. Mut. Ins. Co. v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971) (citation omitted), *cert. denied*, 404 U.S. 1063 (1972).

of action. However, it does not constitute a *per se* illegal tying arrangement. Neither does it constitute a *per se* illegal group boycott or concerted refusal to deal, for the reasons spelled out in Judge Coffrin's opinion below, J. App. at 212-231.

Affirmed.

FEINBERG, *Chief Judge*, (concurring):

I concur in the result reached by the majority, but I would like to add a few words to recount the history of this case in this court.

The appeal was argued on October 9, 1981 and, by opinion dated January 20, 1982, a divided panel affirmed the district court on the group boycott and concerted refusal to deal issues, but reversed and remanded on the tying claim. The majority recognized that a penalty rent could have as strong an adverse effect on Shop & Save's ability to compete as a forced purchase of groceries from Cross. Accordingly, over a strong dissent by Judge Meskill, we held that a penalty rent should be treated as the equivalent of a tie-in and should be condemned if the trial court found that the other factors for finding a tying violation were present. There then occurred the rare event of a successful petition for rehearing.

The tie-in field, like much of antitrust law, rests on certain economic assumptions that are coming under increased scrutiny, see, e.g., R. Bork, The Antitrust Paradox 365-81 (1978). I concur in the changed result reached by the new majority because I agree that in view of the present case law and the current learning, it would be unjustifiable to extend the law regarding tying to the fact pattern presented here. Penalties exacted for the

privilege of buying one product rather than two have been mentioned tangentially at least twice before, and on neither occasion was the practice condemned under the antitrust laws, see International Business Machines Corp. v. United States, 298 U.S. 131, 134 & 139 (1936) (15% increase in rental for release from condition that lessee buy tabulating cards only from lessor); SmithKline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089, 1110-14 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061 & n.3 (3d Cir.), cert. denied, 439 U.S. 838 (1978) (loss of 3% bonus rebate for failure to buy minimum amounts of three products). But cf. United States v. Loew's, Inc., 371 U.S. 38 (1962) (remedial decree forbade non-cost-justified differential between cost of single film and package. But this relief cannot, under our decision in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1136-37 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972), be relied on to determine the elements necessary to prove an illegal tie). I therefore agree with the district court and with the majority in the conclusion that there was no antitrust violation in this case.